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No. 74-1411

# In the Supreme Court of the United States

OCTOBER TERM, 1975

JOSLYN N. WILLIAMS AND
ROBERT L. BOSTICK, PETITIONERS

*v.*

JOHN G. LORENZ, ACTING LIBRARIAN OF CONGRESS,
ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-16a) is reported at 511 F.2d 363. The order of the court of appeals denying suggestions for rehearing *en banc* (Pet. App. 1a-3a) is reported at 511 F.2d 371. The memorandum and order of the district court (Pet. App. 17a-25a) is not officially reported.

### JURISDICTION

The judgment of the court of appeals was entered on February 10, 1975. The petition for a writ of certiorari was filed on May 9, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, in a suit by two federal employees alleging federal employment discrimination, the court of appeals had jurisdiction under 28 U.S.C. 1291 or 28 U.S.C. 1292 to review an order denying class action certification.

## STATUTES AND RULE INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. 1292(a) provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> * * * * *

Rule 23, Fed. R. Civ. P., provides in pertinent part:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; * * *
>
> * * * * *
>
> (c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*
>
> (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.
>
> * * * * *

## STATEMENT

Petitioners are black employees of the Library of Congress (Pet. App. 4a). In June 1972, petitioner Williams was informed that his employment as a copyright examiner would be terminated because he had made material misrepresentations relating to his schooling in his application for the position (*id.* at 5a). Williams admits that the representations were false (*id.* at 19a, n. 3). On July 21, 1972, the Library accepted Williams' resignation in lieu of removal, effective August 11, 1972 (*id.* at 5a). Subsequently, Williams attempted to withdraw his resignation, but the Library would not accept the withdrawal (*ibid.*). On August 11, 1972, Williams filed a complaint with the Equal Employment Opportunity office of the Library, alleging that his removal was the result of racial discrimination and that his resignation was coerced (*ibid.*). Three days later he commenced the present action solely on his own behalf (*ibid.*).

The district court denied Williams' motion for summary judgment, but granted him leave to file an amended complaint under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 111, 42 U.S.C. 2000e-16 (Pet. App. 18a, n. 2). Williams then filed an amended complaint under Title VII, as amended, which, *inter alia*, joined petitioner Bostick as a party-plaintiff and added class action allegations of racially discriminatory practices at the Library of Congress relating to recruitment, hiring, promotion, job classification, and firing (Pet. App. 5a-6a, 18a). Bostick, the only Library employee holding the position of "visual information specialist," alleged



racial discrimination in the consideration of his three applications for job reclassification and promotion (*id.* at 19a).[1]

On August 20, 1973, the district court denied petitioners' motion to certify the suit as a class action (Pet. App. 6a, 25a). After noting that Williams "has admitted to making false statements on his original application for employment" and that Bostick "is employed in a unique capacity, one given to classification dispute," the court held that "[e]ach of their claims of discrimination is unique," and that their claims therefore "lack the typicalness of the claims of the class that is needed to make them proper class representatives" (Pet. App. 20a). Moreover, the court held that the need for class action adjudication was slight in this case because the Library provides an "effective administrative remedy outside of title VII" for processing complaints of discrimination; "[g]iven this effective administrative remedy * * * , a class action is not the superior method of adjudication in this case" (Pet. App. 22a). Finally, the court held that because "the allegations of class discrimination have not proceeded through the proper exhaustion of administrative remedies," they "cannot form the basis for a class action at this time" (*ibid.*).

On September 25, 1973, petitioners appealed from the order denying class action certification (Pet. App. 6a).[2] The court of appeals held that it had no jurisdiction to entertain the appeal under either 28 U.S.C. 1291 or 28 U.S.C. 1292(a)(1). Accordingly, the appeal was dismissed (Pet. App. 15a-16a).

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[1]Two of Bostick's reclassification requests were granted, though not until approximately six and four years after they were made; the third request had been pending for more than two years at the time the amended complaint was filed (Pet. App. 19a).

[2]On October 10, 1973, the district court declined to certify the question for interlocutory appeal under 28 U.S.C. 1292(b) (Pet. App. 6a, n. 3).

The court of appeals first ruled that the district court's order was not a "final decision" within the meaning of 28 U.S.C. 1291 (Pet. App. 6a-13a). It noted that an order refusing to certify a class action "does not dispose of litigation" and "is purely procedural in nature, in that it determines merely the parties to the action without expressing any judgment as to the merits of the case" (Pet. App. 7a). Moreover, "the correctness of the District Court's determination does not evade review since it, along with other procedural decisions, is brought up on appeal after final disposition on the merits" (*ibid.*).

The court considered both the "death knell" doctrine developed by the Second Circuit[3] (Pet. App. 8a-10a) and the "collateral order" doctrine (Pet. App. 11a-13a) which had its origin in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541.[4] The court noted that the "death knell" doctrine had been developed to protect the appealability of orders denying class action certification in complicated cases which competent lawyers would have no incentive to pursue if the potential individual recovery were insignificant (Pet. App. 8a). The court concluded that the doctrine was inapplicable here because "both Bostick and Williams have a sufficient incentive to continue this suit" and because "the Equal Employment Opportunity Act amendments specifically provide for a reasonable attorney's fee for the prevailing party at the

[3]See *Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119, 120 (C.A. 2), certiorari denied, 386 U.S. 1035; *Green* v. *Wolf Corp.*, 406 F.2d 291, 295, n. 6 (C.A. 2), certiorari denied, 395 U.S. 977; *Korn* v. *Franchard Corp.*, 443 F.2d 1311 (C.A. 2).

[4]See also *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 169-172.



discretion of the court in just this type of case" (Pet. App. 10a). As for the "collateral order" doctrine, the court concluded that "[i]n this case, the refusal to certify a class action did not determine collateral claims completely independent of the merits of the case," "[t]he order is indistinguishable from other procedural determinations made in the course of discovery and trial," it required no expenditure of funds, and, most importantly, the decision was "subject to effective review on appeal from final judgment" (*id.* at 12a-13a).

The court of appeals also held that the district court's order did not constitute a modification of or a refusal to issue an injunction appealable under 28 U.S.C. 1292(a)(1) (Pet. App. 13a-14a): "[T]he denial of class action treatment constitutes neither issuance nor denial of an injunction." It noted that "the District Court did not state that the claim for an injunction had no merit, nor that it lacked jurisdiction to grant an injunction, nor even did it express any opinion as to whether injunctive relief was warranted at any particular point in the proceedings" (*id.* at 16a). The court therefore ruled that it would be an "unwarranted expansion of the statutory language" to hold that the district court's order was appealable under 28 U.S.C. 1292(a)(1) (*id.* at 13a-14a).

## ARGUMENT

1. The court of appeals was correct in concluding that the district court's order denying class action certification was not a "final decision" appealable under 28 U.S.C. 1291. Rule 23(c)(1), Fed. R. Civ. P., expressly provides that orders determining the appropriateness of a class action "may be altered or amended before the decision on the merits" and, as the court of appeals noted (Pet. App. 7a, 13a), the correctness of such orders is reviewable on appeal from the final judgment. The court of appeals gave adequate consideration to the ex-

ceptions to the finality rule carved out by the "death knell" and "collateral order" doctrines, and its decision on this point does not conflict with that of any other court of appeals. Accordingly, further review of this issue is not warranted.

2. Petitioners contend further that the decision of the court of appeals denying review under 28 U.S.C. 1292(a)(1) conflicts with the decisions of at least three other circuits (Pet. 7).[5] The decisions cited, however, are readily distinguishable. Each is premised on the assumption that, in the circumstances, denial of class action certification in a suit in which injunctive relief is sought amounts to a modification of or refusal to issue an injunction within the meaning of 28 U.S.C. 1292(a)(1) because it necessarily narrows the scope of possible equitable relief. In the instant case, however, the denial by the district court of class action certification does not narrow the scope of possible equitable relief.

In their amended complaint petitioners prayed for an injunction "enjoining Defendants * * * from engaging in each of the acts, policies and practices in violation of the provisions of Title VII, as amended * * *" (Amended Complaint, p. 9). In a Title VII case of this nature —even one brought by a single plaintiff—the district court is statutorily empowered to enjoin respondent from engaging in any "unlawful employment practice charged

[5] *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177 (C.A. 9); *Yaffe* v. *Powers*, 454 F.2d 1362 (C.A. 1); *Brunson* v. *Board of Trustees of School District No. 1*, 311 F.2d 107 (C.A. 4), certiorari denied, 373 U.S. 933.

We do not understand petitioners' addition to this list of *Rodgers* v. *United States Steel Corp.*, 508 F.2d 152 (C.A. 3) (Pet. 7, n. 2). In *Rodgers*, the Third Circuit held that an order postponing determination of the class action issue was *not* appealable under 28 U.S.C. 1292(a)(1). 508 F.2d at 160.



in the complaint" and to order "such affirmative action as may be appropriate." See 42 U.S.C. 2000e-5(g) and 42 U.S.C. 2000e-16(d). Moreover, since the district court in this case has not struck from petitioners' amended complaint the allegations concerning racial discrimination against third parties, petitioners may still obtain the full measure of injunctive relief for which they prayed, despite the denial of class action certification. Only one of the three decisions allegedly in conflict with the decision below, *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177 (C.A.9), involved a Title VII claim, and in that case the district court had expressly struck from the complaint allegations concerning discrimination against third parties. Since, as we have noted, the district court did not strike such allegations from the complaint in this case, there is no material conflict requiring resolution by this Court.

3. Finally, this case does not in any event warrant further review because petitioners' class action contentions were properly rejected by the district court (see p. 5, *supra*).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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